

I have been watching with great interest the stutter-steps taken toward the era of digital programming, especially since the passage of the Digital Millennium Copyright Act (DMCA).

The DMCA has shattered the traditional balance between copyright holders and the citizenry. Digital media allow access control and use control to be rendered in the same set of procedures and the response of the entertainment industry to the DMCA's passage has been an uninterrupted choking-off of the citizen's fair use rights. Whether music, movie, television, radio, the response is movement towards a pay-per-use model of content delivery. I have no doubt that a broadcast flag requirement would result in more of the same.

The Supreme Court's Betamax decision first codified the practice of time-shifting (and presumably, space-shifting) as fair use of copyrighted broadcast signals. The television industry bitterly fought that decision and the request for a digital broadcast flag is another beachhead in that unending battle. The Commission should be under no misapprehension: if a broadcast flag is required, the television industry will wield it like a club, flagging every program with the most restrictive option possible. The fair use practice of time-shifting will disappear. The past five years have shown that this result is as inexorable and as inevitable as the tides or the changing of the seasons.

In your Notice of Proposed Rulemaking, you make reference to the Broadcast Protection Working Group and the entertainment and electronics companies that took part. Significantly absent (and unwelcome) was any meaningful representation of the public, the citizens whose public domain is supposed to benefit from our system of intellectual property protection. Electronics manufacturers who wish to sell products and entertainment industry moguls who wish to sell per-access "content" have met to work out a common way that each can make a great deal of money. They present this profit opportunity to the Commission as a "consensus" when nothing could be further from the truth. The press were not permitted to cover BPWG meetings and the vital give and take between rightsholders and citizens was utterly absent. Who speaks for us?

Your own Notice almost contemptuously refers to the citizenry EVERY SINGLE TIME as "consumers", as though our role in the debate over intellectual property and content presentation were an entirely passive one, our destiny to gobble up television and subsequently excrete advertiser-driven dollars. Shame on you. To even CONSIDER locking the television industry into the chains a broadcast flag represents without meaningful participation by citizens gives credence to the popular notion that the FCC is little more than a rubber stamp for the entertainment moguls who know that digital transmission represents their holiest of grails: pay-per-use.

The Commission appears to have been misled by the entertainment industry. There is no cache of superior programming just waiting the day when it can be safely released in a digital form. The transition between our existing analog system and a digital one will not result in the wholesale replacement of wacky teen sitcoms with imported British dramas about nobles and their household servants. The content after the transition will be the same as before, only transmitted digitally.

There will be channels offering British nobles and there will be channels offering wacky teens. In any event, I have the right as codified by Betamax to record either the nobles or the teens for later viewing. The broadcast flag will eliminate that utterly.

Furthermore, the electronic restrictions of a broadcast flag reach beyond television programming. If my video recorder or television requires a broadcast flag in its data stream, how am I to watch the footage shot on my pre-existing digital camcorder? How will I extract still frames or brief scenes to use in a television criticism course at my local community college when my equipment has been told No Taping! by the broadcaster? Until a proposal is made which secures my fair use rights under Betamax, no FCC action is needed or even desired.

There should be no requirement of -- or even permission for -- a broadcast flag. Every single fair use I can make today in the analog world must be protected in tomorrow's digital world. Read the Constitution again, and remind yourselves that all intellectual property law stems not from an inborn "right" to control the fruits of one's own thought but from the recognition that society benefits. While there are profits to be made and people to be employed by a manacle-toting content industry, society as a whole does not and will not benefit from the model that industry demands.

Thank you for your time,

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"I'd like to say 'Thank you' on behalf of the group, and I hope we passed the audition." -- John Lennon